

Supreme Court, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.**75-1032**

GERARD P. TROTTA,

Petitioner,

—against—

UNITED STATES OF AMERICA.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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January 20, 1976

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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TO: THE HONORABLE, THE CHIEF JUSTICE OF THE
UNITED STATES AND THE ASSOCIATE JUSTICES
OF THE SUPREME COURT.

Petitioner, Gerard P. Trotta, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit made final in this proceeding on December 22, 1975.

Opinions Below

The opinion of the Eastern District Court of New York rendered by Judge Edward R. Neaher is reported at 396 F. Supp. 755 (June 30, 1975). That of the Court of Appeals, reversing Judge Neaher, was rendered on

November 10, 1975 and is not yet reported. Two Orders of the Second Circuit, denying rehearing and denying *en banc* reconsideration, were made on December 22, 1975. The Opinions and Orders are reproduced in the Appendix (1a, 12a, and 22a).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on November 10, 1975. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on December 22, 1975.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

Question Presented

Does solicitation by public employees, such as petitioner, of funds for the benefit of a political party, amount to extortion under the Hobbs Act? (18 U.S.C. Sec. 1951).

Statute Involved

The Hobbs Act, entitled "Interference with commerce by threats or violence", is reproduced in the Appendix (24a).

Statement

On February 21, 1974 five persons who were active in the Republican party in Oyster Bay, Long Island, were indicted in three companion indictments in the Eastern District of New York charging violations of the Hobbs Act. Petitioner, Gerard P. Trotta, was one of those persons. Petitioner served in two positions: as a public employee, he was the Oyster Bay Commissioner

of Public Works, and as a private citizen he was active on behalf of the Oyster Bay Republican party (minutes of argument, pgs. 41-43). The cases against petitioner's four co-defendants ended in either acquittal or dismissal on the Government's motion. The original indictment against petitioner, and a superseding indictment, were dismissed for failure to properly charge a Hobbs Act violation (2a). On November 1, 1974, a second superseding indictment was filed against petitioner (74 Cr. 681) charging him under the Hobbs Act with extortion upon the partnership of William F. Cosulich Associates (hereafter "Cosulich") (26a).

Cosulich was an engineering contracting firm which did work for towns throughout Long Island including Oyster Bay. Cosulich was also a political contributor and made numerous contributions to political clubs of many political parties—Democratic, Republican, Conservative, Taxpayer, etc.—for which Cosulich took tax deductions.

As an active fund raiser for the Republican party, petitioner appealed to many individuals and firms in the community (including Cosulich) for funds for the party. Cosulich's contributions to the party (referred to in the indictment) were made by check payable to the order of the party. Petitioner was merely a conduit for contributions, one party fund raiser among hundreds (minutes, p. 25).

Analysis of the indictment disclosed that it boiled down to four assertions:

- (1) that petitioner was a public employee, the Commissioner of Public Works;
- (2) that he had certain statutory power which *could* be used to affect the lives of contractors doing business with the town like Cosulich;

Second: he must receive funds.

Third: there must be a specific identifiable misuse by the employee of his official position.

(For a survey of Hobbs Act cases, see 396 F. Supp., p. 757) (4a).

Here there was no allegation that petitioner used or abused his official position in seeking or obtaining political contributions (26a). Allowed to stand, the holding below licenses the indictment of any public employee who seeks funds for any cause from one over whom he holds any degree of power no matter how equivocal. Petitioner suggests that if this wholesale power to indict public employees is to be put into the hands of federal prosecutors, it should only be done after this Court has so determined upon a consideration of the merits of the question. This issue is one of exceptional importance because persons in public service have from time immemorial been involved in other community activities. People holding public positions serve on the boards of charities, political parties, and other institutions. At every level of government they make fund raising appeals on behalf of political parties, charities, and other worthwhile causes.

In view of the innumerable public servants who could conceivably take reprisals against persons who refuse to make contributions, the question of whether political fund raising by a public employee amounts to an extortion is highly significant. This is not the first time that the reach of the Hobbs Act has been challenged in this Court. In *United States v. Enmons*, 410 U.S. 396 (1972) the Court considered whether the Act covered alleged violence committed by strikers during a *bona fide* labor dispute. The Court held that it did not and that the indictment had been properly dismissed. Petitioner submits that, like strikers who are seeking higher wages, political party

fund raisers who are seeking donations are pursuing a socially legitimate end. In *Enmons* this Court cautioned the Government against "too literal" application of the Act (410 U.S., p. 410). The Court stated (410 U.S., p. 411):

"Even if the language and history of the Act were less clear than we have found them to be, the Act could not properly be expanded as the Government suggests—for two related reasons. First, this being a criminal statute it must be strictly construed and any ambiguity must be resolved in favor of lenity (citations omitted). . . . Secondly, it would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes."

If given an opportunity, petitioner is prepared to present to the Court a well-documented argument that the application of the Hobbs Act to political fund raising violates the Due Process clause of the Fifth Amendment and concepts embraced therein. Due Process is offended where equal protection of the laws is denied, *Bolling v. Sharpe*, 347 U.S. 497 (1954), where the defendant is denied fair notice of what it is that is forbidden, *Bowie v. City of Columbia*, 378 U.S. 347, 352 (1964); *Douglas v. Buder*, 412 U.S. 430 (1973), or where the prosecution is a selective or arbitrary one, *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886).

Petitioner respectfully submits that the singling out of one public employee for Hobbs Act prosecution on account of political fund raising solicitations, is violative of each of these Constitutional norms. The Hobbs Act was passed as a result of Congress' dissatisfaction with the Court's holding in *United States v. Local 807*, 315 U.S. 521 (1942) which Congress believed had re-

strictively interpreted the Copeland Anti-Racketeering Act of 1934 (Act of June 18, 1934, ch. 569, secs. 1-6, 48 Stat. 979-980). In the more than forty years that have elapsed since the predecessor Act was enacted, this is the first time that it has been successfully applied to political fund raising. If given the opportunity, petitioner desires to argue to this Court in depth that the holding below is contrary to forty years of case law, was unforeseeable, is a denial of petitioner's right to Due Process of law, and constitutes an attack on the very rubric of our political society.* If the Government's view is upheld, petitioner will have been punished for acts that were not criminal at the time they were performed. Hence the holding below violates the Due Process requirement that a criminal statute must give fair warning of the conduct which it prohibits. As this Court observed in *Bowie v. City of Columbia*, 378 U.S. 347, 352 (1964):

"There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of a narrow and precise statutory language."

* It is a fact of life that all of our political parties exist and have existed because of their ability to raise funds for their survival. Thus, the attack on petitioner cannot be deemed an isolated case. Everyone engaged in political activities must have a definite ruling where time honored practices, conducted openly, are now being attacked as extortionate.

During the pendency of this case, counsel have been flooded with requests for funds for worthy causes from people who have some measure of equivocal power over us. These people are highly reputable and certainly should be enlightened if their perfectly normal conduct has now become criminal. (Exemplars are included in the Appendix to facilitate this Court's taking of judicial notice pursuant to Rule 201 of the Federal Rules of Evidence) (30a *et. seq.*).

Thus, even if a statute be clear on its face, the principle of fair warning is applicable when a statute is broadened judicially as it was done in the Court below. In fact, the violation of one's right might even be greater when one is "lulled" into a false sense of security, giving petitioner no reason even to suspect that his conduct comes within the scope of the statute.

Moreover, the unforeseeable judicial enlargement contended for by the Government operates as an *ex post facto* law which Article I, Section 9, Clause 3, of the Constitution forbids. *Calder v. Bull*, 3 Dall. (3 U.S.) 386, 390 (1798). The Due Process clause bars achieving precisely the same result by judicial construction, *Bowie v. City of Columbia*, *supra*; *Douglas v. Buder*, 412 U.S. 430 (1973).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this court should issue its writ of certiorari to review the decision below .

Respectfully submitted,

HERBERT A. LYON,
WILLIAM M. ERLBAUM,
Counsel for Petitioner.

APPENDIX

APPENDIX A

**Opinion of the United States District Court for the
Eastern District of New York Dismissing the
Second Superseding Indictment**

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

74 Cr. 681

UNITED STATES OF AMERICA,

—against—

GERARD P. TROTTA,

Defendant.

MEMORANDUM AND ORDER

APPEARANCES:

DAVID G. TRAGER, ESQ.
United States Attorney
Eastern District of New York

By: EDWARD P. KORMAN, ESQ.
Chief Assistant U.S. Attorney

LYON & ERLBAUM, ESQS.
Attorneys for Defendant

By: WILLIAM M. ERLBAUM, ESQ.

NEAHER, *District Judge.*

Defendant, a former public official, was indicted while in office for allegedly attempting to affect and affecting commerce by the extortion of political contributions from a partnership of consulting engineers in violation of

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the Hobbs Anti-Racketeering Act, 18 U.S.C. § 1951.¹ He has moved to dismiss the indictment, contending (1) it lacks "a plain, concise and definite" statement of specific facts essential to the offense as required by Rule 7(c), F.R.Crim.P.; (2) it is too vague to protect his constitutional rights to be informed of the nature and cause of the accusation against him; and (3) it is insufficient as a matter of law for failure to allege how, why or in what manner the alleged extortion had an effect on interstate commerce. The merit of those objections must be tested only against the face of the indictment. Extrinsic particulars cannot be relied on to supply any missing essential element. *Russell v. United States*, 369 U.S. 749, 769-770 (1962).

¹ This is the third indictment brought against the defendant for the alleged violations of the Hobbs Act. The earlier ones, 74 Cr. 126 and 74 Cr. 552, were dismissed on the government's consent, following oral argument on defense motions to dismiss and the filing of superseding indictments. The Hobbs Act provides, where pertinent:

"§ 1951. Interference with commerce by threats or violence.

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

* * * * *

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

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Briefly, the indictment describes defendant's official position and authority as the Commissioner of Public Works, Town of Oyster Bay, Long Island. The alleged extortion victim, William F. Cosulich Associates (hereinafter "Cosulich"), is identified as a firm of consulting engineers that provided such services to the Town of Oyster Bay and engaged in interstate commerce. The defendant's powers of office, to the extent they could affect the retention and employment of Cosulich for the Town, are spelled out in some detail, concluding with the allegation that, as was reasonably understood by Cosulich, defendant had

"the power to take action which could adversely affect William F. Cosulich Associates in obtaining and performing contracts with the Town of Oyster Bay, Long Island."

With that, each of the two counts in the indictment alleges in *haec verba* that defendant violated the Hobbs Act "by knowingly and wilfully demanding and obtaining from William F. Cosulich Associates" a specified sum of money on or about a specific date (different in each count),

"for the benefit of the Republican Committee of the Town of Oyster Bay, Long Island, with the consent of William F. Cosulich Associates, and its members, to the aforesaid payment having been induced by the defendant Gerard P. Trotta under color of official right." (Emphasis supplied.)

Before discussing defendant's criticism of those allegations, some comment on the precise nature of the alleged offense is in order. Defendant is charged with affecting commerce by means of "extortion" in violation

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of 18 U.S.C. § 1951(a), as that term is defined in § 1951(b)(2), *supra* n. 1. Comparison of that definition with the above emphasized language of the indictment reveals that this case is founded solely on the statutory definition of extortion as “the obtaining of property from another, with his consent, induced . . . under color of official right.” *Id.*

Recent case law leaves no doubt that the language “under color of official right” is regarded as broad enough to include within its scope any public official or employee who *wrongfully* uses his official position to exact a payment not due him or his office, under circumstances which can be said to affect commerce “in any way or degree”, *supra* n. 1. *United States v. Braasch*, 505 F.2d 139, 151 (7 Cir. 1974) (police officers exacting “protection” money from liquor establishments); *United States v. Crowley*, 504 F.2d 992, 995 (7 Cir. 1974) (police officer demanding periodic payoffs for “providing security” to bowling alley); *United States v. Staszczuk*, 502 F.2d 875, 877-78 (7 Cir. 1974) (city alderman accepting payment not to oppose a zoning application); *United States v. Kenny*, 462 F.2d 1205, 1229 (3 Cir.), *cert. denied*, 409 U.S. 914 (1972) (city and county officials exacting “kickbacks” as a condition to award of public contracts); *United States v. Irati*, 503 F.2d 1295, 1299-1301 (7 Cir. 1974) (clerk in city collector’s office expediting liquor license application for suggested payment); *United States v. Price*, 507 F.2d 1349, 1350 (4 Cir. 1974) (county council chairman requiring payment to insure grant of motel permit).

The offense of extortion “under color of official right” is separate and distinct from coercive extortion—whereby property is obtained “by wrongful use of actual or

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threatened force, violence, or fear”²—in that proof of such duress is generally thought not to be required.³ Instead, the “office held by the official provides the coercive impetus which generates the payment.”⁴ More generally, it has been held that this portion of the Hobbs Act states an offense equivalent to the common law crime of extortion, a crime that originally only a public official could commit.⁵

Against this background can it be said that the statutory language used in this indictment renders it insufficient and constitutionally vague, and fails to give defendant adequate notice of the charges against him? The defendant argues in essence that no facts appear on

² 18 U.S.C. § 1951(b)(2), *supra* n. 1.

³ *United States v. Braasch*, *supra*, 505 F.2d at 151 n. 8 (holding this offense does not require proof of coercion); *United States v. Crowley*, *supra*, 504 F.2d at 995 n. 5 (holding the offense need not involve force or threat); *United States v. Kenny*, *supra*, 462 F.2d at 1229 (holding proof of threat, fear or duress not required). See generally *United States v. Staszczuk*, *supra*, 502 F.2d at 877-78; Stern, *Prosecutions of Local Political Corruption under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion*, 3 Seton Hall L. Rev. 1, 14-16 (1971).

⁴ *United States v. Staszczuk*, *supra*, 502 F.2d at 883 (Campbell, J., concurring). See *United States v. Sutter*, 160 F.2d 754, 756 (7 Cir. 1947); Stern, *supra* n. 3, 3 Seton Hall L. Rev. at 15-17.

⁵ *United States v. Crowley*, *supra*, 504 F.2d at 994-95; *United States v. Kenny*, *supra*, 462 F.2d at 1229. See *United States v. Nardello*, 393 U.S. 286, 289 (1969) (“At common law a public official who under color of office obtained the property of another not due either to the office or the official was guilty of extortion”). See generally authorities cited in *United States v. Braasch*, *supra*, 505 F.2d at 151 n. 8; *United States v. Crowley*, *supra*, 504 F.2d at 995 n. 4; 3 Wharton, *Criminal Law* §§ 1392, *et seq.* (Anderson ed. 1957); Stern, *supra* n. 3, 3 Seton Hall L. Rev. at 15-17.

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the face of the indictment which identify any conduct on his part pointing to criminality. Thus, he contends, he is left uninformed of the specific acts or conduct alleged to be in transgression of federal law.

The standard for judging the sufficiency of an indictment employing the words of a statute was recently reiterated by the Supreme Court in *Hamling v. United States*, — U.S. —, 94 S.Ct. 2887 (1974), at 2907:

“It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as ‘those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth *all the elements* necessary to constitute the offence intended to be punished.’ *United States v. Carll*, 105 U.S. 611, 612, 26 L.Ed. 1135 (1881).” (Emphasis supplied.)

The government rejects the claims of insufficiency, vagueness and inadequacy of notice, asserting that all of the “crucial facts” are alleged. These are identified as (1) the defendant’s official position; (2) his ability to take official action adversely affecting the victim; (3) the victim’s awareness of that power; and (4) the defendant’s demand for, and receipt of, monies from the victim on the dates alleged.⁶ In the government’s view these are the essential elements of the offense charged, aside from the commerce element. As its brief states, “our position was that a demand for monies made by someone holding a public office from another person who could

⁶ Gov’t Mem. of Law at 9.

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‘adversely and directly be affected’ by the manner in which the public official exercised his powers constituted extortion under color of official right.”⁷

Close analysis of the Hobbs Act and the cases applying it to local public officials casts serious doubt on the government’s conception of what constitutes a violation of that Act. There is no question that Congress viewed actual or attempted interference with commerce by extortion or other unlawful means as a major federal offense. This is manifest from the severity of the penalty authorized for offenders—up to twenty years in prison and/or a \$10,000 fine. In sharp contrast is the penalty for extortion committed by federal officers or employees “under color or pretense of office” as reflected in 18 U.S.C. § 872. For that offense—which could be committed by officials of vastly more powerful position than that held by this defendant—the maximum punishment is three years in prison and/or a \$5,000 fine. The same maximum punishment is provided for federal officials who solicit or receive a “contribution for any political purpose.” 18 U.S.C. § 602.

Plainly, as the reported cases show, to allege a Hobbs Act violation requires substantially more than the “crucial facts” offered by the government. The charging portions of the instant indictment do not allege even the official extortion forbidden to federal officials in 18 U.S.C. § 872. Defendant is not accused of having made demands upon Cosulich “under color or pretense of office”, only that Cosulich’s consent . . . [was] induced by the defendant

⁷ *Id.* at 10.

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... under color of official right", p. 3 *supra*. And the government has clearly stated its interpretation of the last quoted clause: that defendant's "ability to take official action adversely" to Cosulich and the latter's "awareness of that power" constitutes extortion "under color of official right", p. 6 *supra* (emphasis supplied).

Although the victim's state of mind is always an essential element of the crime of extortion, *United States v. Kennedy*, 291 F.2d 457, 458 (2 Cir. 1961), it is not a substitute for the key essential element—actions or words by the alleged extortioner which induce a reasonable compulsion in the victim to submit to the extortioner's demand. While, as already noted, p. 5 *supra*, official position is regarded as a coercive substitute for threats of harm, that is not to say that a local public official who demands and obtains a political contribution from a businessman he can adversely affect *ipso facto* violates the Hobbs Act. Such a practice, however questionable and not to be condoned, is not extortion within the meaning of that Act any more than it is under the Penal Law of New York.⁸

⁸ N.Y. Penal Law § 155.05(2) (McKinney 1975) provides, where pertinent:

"§ 155.05 Larceny; defined

"2. Larceny includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subdivision one of this section, committed in any of the following ways:

"(e) By extortion.

"A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him

[Footnote continued on following page]

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An allegation that the defendant is a public official is not enough. Power inheres in public office. Every public official possesses the ability to affect favorably or adversely those who must (or believe they must) deal with him. The mere possession of that ability or the alleged victim's state of mind regarding it does not supply the missing element; nor does the defendant's "demanding and obtaining" the alleged political contributions. Solicitations for a political party are not part of any official duty. Whatever one may think of the ethics of the practice, a local public official's solicitation or receipt of political contributions is neither unlawful nor extortionate unless a *corrupt use* of the public office is manifest. See *United States v. Sutter*, 160 F.2d 754 (7 Cir. 1947). See also N.Y. Penal Law § 200, *et seq.* (McKinney 1975).

Since the days of Blackstone, extortion under color of office has been uniformly recognized as the unlawful or wrongful taking by a public official of money not due either to the office or the official.⁹ It is of the essence of

a fear that, if the property is not so delivered, the actor or another will:

"(viii) Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely:"

⁹ Blackstone defined extortion as

"an abuse of public justice, which consists in any officer's unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due." 4 W. Blackstone, Commentaries 141 (1769).

The common law formulation in this country has been essentially the same. See 3 Wharton, *supra*, § 1392.

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the offense that “[t]he money . . . received must have been claimed or accepted in right of office, and the person paying must have yielded to official authority.” 3 Wharton, *supra* n. 5, § 1393. See R. Perkins, Criminal Law 369-70 (2d ed. 1969). In addition, the officer must act with a corrupt motive, as the synonymous terms “under color of office” and “under color of official right” are technical expressions implying bad faith, corruption or breach of duty. See 3 Wharton, *supra* n. 5, § 1394; Perkins, *supra* at 371; Stern, *supra* n. 3, 3 Seton Hall L. Rev. at 14-15 & n. 61. See also the recent cases noted above, p. 4 *supra*.

The instant indictment contains on its face no allegation of acts or words by defendant which could reasonably be construed to satisfy the elements of “extortion . . . under color of official right” within the meaning of the Hobbs Act. The words “wrongful use of” in the statutory definition, § 1951(b)(2), must be read in conjunction with “under color of official right” as they are in the case of “actual or threatened force, violence, or fear”, otherwise innocent action by a public official could assume criminal coloration under the Act simply by virtue of his office.¹⁰

The words “unlawfully attempt to affect commerce” or “knowingly and wilfully demanding and obtaining”

¹⁰ See *United States v. Kenny*, *supra*, where the court approved the following instruction:

“Extortion under color of official right is the *wrongful taking* by a public officer of money not due him or his office, whether or not the taking was accomplished by force, threats or use of fear.” 462 F.2d at 1229 (emphasis supplied).

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the alleged political contribution do not supply the key missing element of wrongful or corrupt use of office. There can be no crime against commerce unless there is a crime of official extortion. There is no such extortion unless facts are alleged which disclose a payment made and received either for, or in contemplation of, a wrongful or corrupt use of office. The mere allegation that the consent of Cosulich was “induced by [defendant] under color of official right” is not a substitute which expresses “without any uncertainty or ambiguity . . . all the elements necessary to constitute the offense intended to be punished.” *Hamling v. United States*, *supra*, 94 S.Ct. at 2907. If the government has such facts, it should set them forth in the indictment. Without them it has no offense.¹¹

The defendant’s motion to dismiss the indictment is granted.

SO ORDERED.

/s/ EDWARD R. NEAHER
U.S.D.J.

Dated: Brooklyn, New York
June 30, 1975

¹¹ The government argues that in a prior brief dealing with an earlier dismissed indictment, defense counsel cited the indictment in *United States v. Palmiotti*, 254 F.2d 491 (2 Cir. 1958), as a good example of a proper indictment. The implication is that this indictment meets that test. It clearly does not. In *Palmiotti* all the factual elements of a classic labor extortion case based on threats of violence were succinctly set forth, including the interference with interstate shipments of construction granite. Nothing of the sort is shown in this indictment.

APPENDIX B

**Opinion of the United States Court of Appeals for the
Second Circuit Reversing the Dismissal
of the Indictment**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 289—September Term, 1975.

(Argued September 29, 1975 Decided November 10, 1975.)

Docket No. 75-1267

UNITED STATES OF AMERICA,

Appellant,

—v.—

GERARD P. TROTTA,

Defendant-Appellee.

Before:

LUMBARD, ANDERSON and VAN GRAAFEILAND,
Circuit Judges.

Appeal by the Government from an order entered in the United States District Court for the Eastern District of New York, Neaher, *Judge*, dismissing, for inadequacy, an indictment charging the defendant in two counts, with attempting to affect and affecting interstate commerce by extorting political contributions in violation of the Hobbs Act, 18 U.S.C. § 1951. Reversed and remanded.

*Appendix B—Opinion of the United States Court of
Appeals for the Second Circuit Reversing the
Dismissal of the Indictment*

EDWARD R. KORMAN, Chief Assistant U. S.
Attorney, Eastern District of New York
(David G. Trager, U. S. Attorney, Eastern
District of New York, on the brief), *for
Appellant.*

HERBERT A. LYON, Esq., Kew Gardens, N. Y.
(Lyon and Erlbaum, William M. Erlbaum,
Esq., and Charles Wender, Esq., Kew
Gardens, N. Y., on the brief), *for Appellee.*

ANDERSON, *Circuit Judge:*

The appellee, Gerard P. Trotta, was indicted¹ on two counts of extortion under the Hobbs Act, 18 U.S.C. § 1951,

¹ The indictment reads, in relevant part, as follows:

"1. At all times relevant herein, William F. Cosulich Associates was a partnership organized under the laws of the State of New York to perform services as consulting engineers. William F. Cosulich Associates provided these services for public bodies and agencies in the State of New York, including the Town of Oyster Bay, Long Island, and other states. . . .

2. The defendant Gerard P. Trotta, at all times relevant herein, was Commissioner of Public Works of the Town of Oyster Bay, Long Island. As such, the defendant Gerard P. Trotta, was authorized and empowered, subject to the prior approval of the Town Board . . . to retain and employ private engineers, architects and consultants, or firms practicing such profession, for the purposes of (1) preparing designs, plans and estimates of structures or projects of any type and character; (2) rendering assistance and advice in connection with any project whether defined or proposed and under the supervision of the department of public works; and (3) performing such other and necessary services as the commissioner may deem necessary in the

[Footnote continued on following page]

Appendix B—Opinion of the United States Court of Appeals for the Second Circuit Reversing the Dismissal of the Indictment

based on acts which he allegedly committed while Commissioner of Public Works of the Town of Oyster Bay, Long Island. The indictment charges that Trotta demanded and induced the payments of \$2,000 and \$1,000, under the respective counts, in political contributions to the local

administration of the department (Town of Oyster Bay Local Law # 2-1966). Moreover, at all times relevant herein, contracts which were entered into by the Commissioner of Public Works of the Town of Oyster Bay on the Town's behalf, including contracts with William F. Cosulich Associates, generally designated the Commissioner of Public Works as the representative of the Town of Oyster Bay, who was vested with complete authority to monitor and oversee the performance of the contractor.

3. Accordingly, the defendant, GERARD P. TROTTA, had and was reasonably understood by William F. Cosulich Associates, and its members, to have the power to take action which could adversely affect William F. Cosulich Associates in obtaining and performing contracts with the Town of Oyster Bay, Long Island.

COUNT ONE

1. On or about the 25th day of February, 1972, within the Eastern District of New York, the defendant GERARD P. TROTTA did unlawfully attempt to affect commerce and did unlawfully affect commerce as that term is defined in Section 1951(b)(3) of Title 18, United States Code, by knowingly and wilfully demanding and obtaining from William F. Cosulich Associates the sum of Two Thousand Dollars (\$2,000.00) for the benefit of the Republican Committee of the Town of Oyster Bay, Long Island, with the consent of William F. Cosulich Associates, and its members, to the aforesaid payment having been induced by the defendant GERARD P. TROTTA under color of official right.

* * * * *

Count One further alleges that the defendant thereby affected interstate commerce.

Count Two follows the allegations of Count One in charging the same offense but with respect to a different instance in which payment was demanded and made of the additional sum of \$1,000.

Appendix B—Opinion of the United States Court of Appeals for the Second Circuit Reversing the Dismissal of the Indictment

Republican Committee from the engineering firm of William F. Cosulich Associates (Cosulich) "under color of official right." These charges were prefaced with allegations that, throughout the period of time covered by the indictment, Cosulich was providing engineering services to Oyster Bay, among other municipal corporations; that Trotta, as Commissioner of Public Works, exercised the functions of making contracts with engineering firms on behalf of the Town and supervising their performance under the contracts. It also alleged that Cosulich, which consented to these payments, reasonably understood that Trotta "[had] the power to take action which could adversely affect [the firm] in obtaining and performing contracts with the Town of Oyster Bay."

The appellees moved in the district court to dismiss the indictment on the ground that it failed to allege with sufficient specificity all of the necessary facts comprising the offense charged. The court granted the motion, and the Government has appealed. We reverse.

To a great extent the parties' arguments are directed to the substantive interpretation of the crime in question.

The Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). The offense charged here is one under "color of official right" and not through the use of force, violence or fear. That the direct benefit of the money paid went to the Republican Committee rather than to Trotta does not lessen Trotta's culpability under the statute. ". . . [E]xtortion as defined in the statute in no way depends upon having a direct benefit conferred on the person who obtains the property." *United States v. Green*, 350 U.S. 415, 420 (1950).

Appendix B—Opinion of the United States Court of Appeals for the Second Circuit Reversing the Dismissal of the Indictment

The Government claims, in effect, that the Hobbs Act is violated when a public official with criminal intent demands payments of money by someone who does not owe the money to the official or his office, but who is so situated that he can be adversely and directly affected by the manner in which the public official exercises his powers, and under these circumstances the public official demands and induces the payment of the money by color of official right. It asserts that the indictment in this case charging Trotta's violation of the Act is adequate. The appellee, Trotta, argues, however, that the indictment is deficient because it does not specifically allege and describe an "identifiable misuse of office" by Trotta, that is to say, it does not explicitly describe what Trotta agreed to do in his official capacity in return for the payment of the money—in short, the *quid pro quo*.

Based largely on this claim by the defendant-appellee, the trial court held³ that the words "under color of official right" are too vague and general to meet the requirements of the Fifth and Sixth Amendments to the United States Constitution and the Federal Rules of Criminal Procedure.⁴

³ In the course of its argument the Government made frequent reference to a summary of an "offer of proof" made in connection with a pre-trial conference; and the defendant-appellee discussed at some length the prosecution of another public officials of the Oyster Bay area and the disposition made of those cases. This appeal is from a judgment of the district court declaring the indictment in this case against Trotta insufficient on its face. This court has no interest in these discussions of extraneous matters, and they have been disregarded.

⁴ F.R. Crim. P. 7(c) (1) provides, in part: "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

Appendix B—Opinion of the United States Court of Appeals for the Second Circuit Reversing the Dismissal of the Indictment

The Supreme Court cases on the subject, however, "indicate that an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117 (1974). The first criterion serves at least two constitutional goals: the Sixth Amendment right of the accused "to be informed of the nature and cause of the accusation"; and the Fifth Amendment right to be tried only on the charge of a grand jury, as distinguished from and unmodified by any interpolations of the prosecution. *Russell v. United States*, 369 U.S. 749, 760-61, 766, 770-71 (1962). Following these criteria, this Circuit has "consistently sustained indictments which track the language of a statute and, in addition, do little more than state time and place in approximate terms." *United States v. Salazar*, 485 F.2d 1272, 1277 (2 Cir. 1973), *cert. denied*, 415 U.S. 985 (1974). See also *United States v. Cohen*, — F.2d — (2 Cir. June 26, 1975), slip op. at 4405, 4415; *United States v. Tramunti*, — F.2d — (2 Cir. March 7, 1975), slip op. at 2107, 2151-52; *United States v. Sperling*, 506 F.2d 1323, 1344 (2 Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *United States v. Fortunato*, 402 F.2d 79, 81 (2 Cir. 1968), *cert. denied*, 394 U.S. 933 (1969); *United States v. Palmiotti*, 254 F.2d 491, 495 (2 Cir. 1958).

Here the pertinent portions of the statute are "tracked" in the indictment⁵ and in addition the dates,

⁵ The appellee disputes this, contending that the term "wrongful use" in § 1951(b) (2) must be read as applying to "under color of official right" as well as to "actual or threatened force, violence, or fear." While a defendant's use of his office must

[Footnote continued on following page]

Appendix B—Opinion of the United States Court of Appeals for the Second Circuit Reversing the Dismissal of the Indictment

approximate location, and amounts of the alleged extorted payments, together with the identity of the payor, are alleged in specific terms. It is true that merely repeating the words of the statute which defines an offense will not make the indictment sufficient if the statutory language fails to apprise the defendant, "with reasonable certainty, of the nature of the accusation against him." *Russell, supra*, at 765, citing *United States v. Simmons*, 96 U.S. 360, 362. But we are of the opinion that the phrase "under color of official right" as used in § 1951 has an historically recognized and accepted meaning⁶ which, taken together with the rest of the indictment, makes it clear that Trotta is charged with using the power of his office over Town engineering contracts to induce payments of money from Cosulich which Trotta had no right to receive.

In *Palmiotti, supra*, the defendant asserted a very similar challenge of his indictment for extortion under

indeed be wrongful in order to constitute extortion under the first portion of the statutory definition, this element is implicit in the concept of "under color of official right," and the allegation that Trotta acted "knowingly and wilfully" charges him with doing so with criminal intent. The language of § 1951(b) (2) cannot be grammatically read in such a way as to require an explicit allegation of "wrongful use" in order to track the statute.

⁶ See, *infra*, quotation from *United States v. Braasch*, 505 F.2d 139, 151 (7 Cir. 1974). The phrase "under color of official right," like the definition of the word "obscene" in *Hamling v. United States*, 418 U.S. 87, 118 (1974), "is not a question of fact, but one of law . . . [and] is . . . a legal term of art." Also equally applicable to the definition of the phrase "under color of official right" is what the Court went on to say about the definition of "obscenity": "The legal definition of obscenity does not change with each indictment; it is a term sufficiently definite in legal meaning to give a defendant notice of the charge against him."

Appendix B—Opinion of the United States Court of Appeals for the Second Circuit Reversing the Dismissal of the Indictment

the "force, violence, or fear" portion of § 1951. The indictment charged that, on or about a particular date, he obtained from a named company a specified sum of money, "with [the payor's] consent induced by wrongful use of threatened force and fear." 254 F.2d at 495. The defendant argued that "while the allegations of the indictment follow the language of 18 U.S.C. § 1951, the vital thrust of the indictment lies in the particular kind of 'wrongful use of actual or threatened force, violence, or fear' relied upon, and that the omission to state this in specific rather than general terms is in effect the omission of the 'essence' of the charge and a fatal defect." *Id.* Applying the two criteria for sufficiency, discussed *supra*, the court rejected this argument. In *Fortunato, supra*, the court upheld an indictment which charged the defendant with "wilfully misapplying" bank funds. Contrary to the defendant's contention that this phrase standing alone was impermissibly vague, the court held that the grand jury was not required to specify more precisely the unlawful means used or the nature of the defendant's alleged abuse of his authority at the bank.

As the appellee and the district court recognized, extortion "under color of official right" as prohibited by the Hobbs Act is basically equivalent to the common law crime (official) extortion,⁷ and as such its meaning, as a

⁷ "The 'under color of official right' . . . portion of the definition is the common law definition of extortion, a crime which could only be committed by a public official, and which did not require proof of threat, fear, or duress." *United States v. Kenny*, 462 F.2d 1205, 1229 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972). See also *United States v. Mazzei*, — F.2d — (3d Cir. July 29, 1975) No. 75-1357; *United States v. Crowley*, 504 F.2d 992, 995 (7 Cir. 1974); *United States v. Nedley*, 255 F.2d 350, 355 (3d Cir. 1958). Cf. *Martin v. United States*, 278 F. 913, 917 (2d Cir. 1922).

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legal term of art, is well-defined. "At common law a public official who under color of office obtained the property of another not due either to the office or the official was guilty of extortion." *United States v. Nardello*, 393 U.S. 286, 289 (1969). This Circuit long ago "adopted the classic definition of Blackstone"^{*} in construing the crime of extortion by federal officers established by the predecessor to 18 U.S.C. § 872." *Martin v. United States*, 278 F. 913, 917 (2d Cir. 1922). The Seventh Circuit has recently described the offense of extortion under color of official right in the following terms:

"The use of office to obtain payments is the crux of the statutory requirement of 'under color of official right', and appellants' wrongful use of official power was obviously the basis for this extortion. . . . It matters not whether the public official induced payments to perform his duties or not to perform his duties, or even, as here, to perform or not to perform acts unrelated to his duties which can only be undertaken because of his official position. So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951." *United States v. Braasch*, 505 F.2d 139, 151 (7 Cir. 1974), *cert. denied* 421 U.S. 910 (1975).

^{*} Blackstone defined extortion as:

"an abuse of public justice, which consists in any officer's unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due." 4 W. Blackstone, *Commentaries* 141 (1769).

^o "Whoever, being an officer, or employee of the United States . . . under color or pretense of office or employment commits or attempts an act of extortion, shall be fined not more than \$5,000 or imprisoned not more than three years, or both. . ."

Appendix B—Opinion of the United States Court of Appeals for the Second Circuit Reversing the Dismissal of the Indictment

We conclude that there is no merit in any of the claims made by the appellee. One of the principal assertions is that the indictment is defective because of its failure to allege "a specifically identifiable misuse of office," in which Trotta engaged, as an unlawful *quid pro quo* or a consideration in the nature of official action running from Trotta to Cosulich in return for the payment of the money not lawfully owed. This, it appears, might be an exercise of the powers of his office in his line of duty or a forbearance to carry out a duty. Such a *quid pro quo* may, of course, be forthcoming in an extortion case, or it may not. In either event it is not an essential element of the crime.

But the pressure exerted by Trotta by means of the power of his public office to induce the payment of the money is, in itself, the misuse of the office; and, as stated in *Braasch, supra*, it does not matter whether Trotta "induced payments to perform his duties or not to perform his duties." Nor does it matter that the payments may have been induced simply by assertion of power or pressure stemming from Trotta's position as a public official. *United States v. Price*, 507 F.2d 1349 (4 Cir. 1974). To repeat, it is the use of the power of the public office itself to procure the payments of money not owed to the public official or his office that constitutes the offense. This was adequately alleged; and we, therefore, hold that the indictment is sufficient on its face.

The judgment of the district court is reversed and the case is remanded for trial.

APPENDIX C

**Orders of the United States Court of Appeals for the
Second Circuit Denying Rehearing and Denying
En Banc Reconsideration**

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court
of Appeals, in and for the Second Circuit,
held at the United States Court House,
in the City of New York, on the twenty-
second day of December, one thousand
nine hundred and seventy-five.

Present: HON. J. EDWARD LUMBARD,
HON. ROBERT P. ANDERSON,
HON. ELLSWORTH A. VAN GRAAFEILAND,
Circuit Judges.

75-1267

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

—v.—

GERARD P. TROTTA,
Defendant-Appellee.

A petition for a rehearing having been filed herein by
counsel for the appellee

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court
of Appeals, in and for the Second Circuit,
held at the United States Court House,
in the City of New York, on the twenty-
second day of December, one thousand
nine hundred and seventy-five.

75-1267

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

—v.—

GERARD P. TROTTA,
Defendant-Appellee.

A petition for rehearing containing a suggestion that
the action be reheard in banc having been filed herein by
counsel for the appellee, and no active judge or judge
who was a member of the panel having requested that a
vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN
Chief Judge

APPENDIX D

Statute Involved—The Hobbs Act

§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term “robbery” means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term “extortion” means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term “commerce” means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside

Appendix D—Statute Involved—The Hobbs Act

thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

APPENDIX E

Second Superseding Indictment

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

74 Cr. 681

(18 U.S.C., § 1951)

November 1, 1974

 UNITED STATES OF AMERICA

—against—

GERARD P. TROTTA,

Defendant.

 THE GRAND JURY CHARGES:

INTRODUCTION

1. At all times relevant herein, William F. Cosulich Associates was a partnership organized under the laws of the State of New York to perform services as consulting engineers. William F. Cosulich Associates provided these services for public bodies and agencies in the State of New York, including the Town of Oyster Bay, Long Island, and other states. Moreover, William F. Cosulich Associates, at all times relevant herein, engaged in interstate commerce and in the purchase and sale of goods and services in interstate commerce and made use of the facilities of interstate commerce.

2. The defendant Gerard P. Trotta, at all times relevant herein, was Commissioner of Public Works of the

Appendix E—Second Superseding Indictment

Town of Oyster Bay, Long Island. As such, the defendant Gerard P. Trotta, was "authorized and empowered, subject to the prior approval of the Town Board . . . to retain and employ private engineers, architects and consultants, or firms practicing such profession, for the purposes of (1) preparing designs, plans and estimates of structures or projects of any type and character; (2) rendering assistance and advice in connection with any project, whether defined or proposed and under the supervision of the department of public works; and (3) performing such other and necessary services as the commission may deem necessary in the administration of the department." (Town of Oyster Bay, Local Law #2-1966). Moreover, at all times relevant herein, contracts which were entered into by the Commissioner of Public Works of the Town of Oyster Bay on the Town's behalf, including contracts with William F. Cosulich Associates, generally designated the Commissioner of Public Works as the representative of the Town of Oyster Bay, who was vested with complete authority to monitor and oversee the performance of the contractor.

3. Accordingly, the defendant, Gerard P. Trotta, had and was reasonably understood by William F. Cosulich Associates, and its members, to have the power to take action which could adversely affect William F. Cosulich Associates in obtaining and performing contracts with the Town of Oyster Bay, Long Island.

COUNT ONE

1. On or about the 25th day of February, 1972, within the Eastern District of New York, the defendant Gerard P. Trotta did unlawfully attempt to affect com-

Appendix E—Second Superseding Indictment

merce and did unlawfully affect commerce as that term is defined in Section 1951(b)(3) of Title 18, United States Code, by knowingly and wilfully demanding and obtaining from William F. Cosulich Associates the sum of Two Thousand Dollars (\$2,000.00) for the benefit of the Republican Committee of the Town of Oyster Bay, Long Island, with the consent of William F. Cosulich Associates, and its members, to the aforesaid payment having been induced by the defendant Gerard P. Trotta under color of official right.

2. The aforesaid conduct of the defendant Gerard P. Trotta, by depleting the assets of William F. Cosulich Associates, which transacted business in interstate commerce, purchased and sold goods and services in interstate commerce, and made use of the facilities of interstate commerce, had the potential of affecting commerce and did affect commerce as that term is defined by Title 18, United States Code, Section 1951(b)(3). (Title 18, United States Code, Section 1951).

COUNT TWO

1. On or about the 21st day of July, 1972, within the Eastern District of New York, the defendant Gerard P. Trotta did unlawfully attempt to affect commerce and did unlawfully affect commerce as that term is defined in Section 1951(b)(3) of Title 18, United States Code, by knowingly and wilfully demanding and obtaining from William F. Cosulich Associates the sum of One Thousand Dollars (\$1,000.00) for the benefit of the Republican Committee of the Town of Oyster Bay, Long Island, with the consent of William F. Cosulich Associates, and its members, to the aforesaid payment having been induced by the defendant Gerard P. Trotta under color of official right.

Appendix E—Second Superseding Indictment

2. The aforesaid conduct of the defendant Gerard P. Trotta, by depleting the assets of William F. Cosulich Associates, which transacted business interstate commerce, purchased and sold goods and services in interstate commerce, and made use of the facilities of interstate commerce, had the potential of affecting commerce and did affect commerce as that term is defined by Title 18, United States Code, Section 1951(b)(3). (Title 18, United States Code, Section 1951).

A TRUE BILL.

.....
Foreman

DAVID G. TRAGER
United States Attorney
Eastern District of New York

APPENDIX F

Exemplars

GERALD R. FORD

WASHINGTON

December 8, 1975

Dear Mr.

I am writing you today to personally ask for your help in a matter that is of great concern to me.

Since becoming President, I have tried to achieve many things. Among them are holding the line of government spending to reduce inflation, a strong national defense, less government regulation, and a national energy program to prevent us from being at the mercy of foreign energy suppliers.

As you know, many of these efforts and other positive steps have been thwarted by a Congress heavily controlled by the Democrats. In some instances, the Congress has turned a deaf ear; in others it has written its own extravagant legislation.

I have had to employ the veto over 30 times to stem this tide of irresponsible legislation.

However, Mr., you and I know that this is only a temporary solution.

What America needs is a Republican Congress working for Republican goals. Unless more Republicans are elected in 1976, inflation and excessive deficit spending will continue.

Appendix F—Exemplars

That is why I have visited many regions of the country for the Republican Party and Republican candidates. Though I would prefer to contact you on one of these party-building trips, time dictates a written message.

Democrats seem to believe that America is great because of what government does for people and generally vote for more government programs, more federal spending and taxing. Republicans believe America is great because of what free people do for themselves and generally vote for less government involvement. Democrats have controlled the Congress for 40 of the last 45 years and have contributed to the many problems we face today.

The best way to begin overcoming such problems is to elect more Republicans to Congress in 1976. That is the best way to reduce wasteful government spending, cut back needless federal controls which are strangling our private enterprise system, and refrom a welfare system that saps individual initiative and costs you and other taxpayers billions of dollars each year.

This is why I sincerely hope you will decide, today, to support the outstanding work of the National Republican Congressional Committee in its effort to elect Republicans in 1976.

This committee supports Republican candidates for the House of Representatives with direct campaign contributions and a wide variety of important campaign services.

From my own experience as a Member of Congress, I know that the Committee's support is invaluable in electing and re-electing Republicans to the House of Representatives.

Appendix F—Exemplars

Committee Chairman, Congressman Guy Vander Jagt, has told me a financial goal of \$2,100,000 has been established for the 1976 GOP Victory Fund. I feel this sum is reasonable and necessary. It must be achieved.

You can play a major role by joining me and the Committee in our joint efforts to elect a Republican Congress by sending your maximum contribution in the enclosed envelope. In order to successfully reach this goal, we need virtually 100% participation by all friends and supporters of this Committee.

Without your help we simply cannot elect more Republicans to Congress.

I look forward to Chairman Vander Jagt's report to me on the results of this appeal, Mr.

Thank you in advance for your assistance.

Sincerely,

JERRY FORD

Appendix F—Exemplars

THE VICE PRESIDENT

WASHINGTON

Dear Fellow American:

Next year, 1976, will be an historic year for all of us. It will be our Bicentennial year—a year to celebrate the 200 years of freedom our Nation has enjoyed and a year to consider carefully what will happen to the system of government which our forefathers so wisely devised.

I have recently visited with the National Republican Senatorial Committee. The Chairman of that Committee, Senator Ted Stevens, has pointed out that in 1976 there will be 33 United States Senate positions up for election—11 Republicans and 22 Democrats now hold those positions. It is possible for Republicans to elect a majority to the Senate—and at the very least 1976 offers a great opportunity to restore the balance of the two-party system in the Senate.

The Republican Senatorial Committee wants to start now to assist Republican Senators who will seek re-election. And the Committee must also help identify and encourage candidates to challenge incumbent Democrats. To do this, consistent with the new campaign financing laws, the Republican Senatorial Committee needs your help.

Under the new laws, a person may contribute up to \$25,000 to the Senatorial Committee and any amount of financial help now will enable the Committee to get off to an early start on its campaign to elect strong Republican Senators in 1976. The Committee would be happy to answer any questions you may have about procedures under the new law.

Appendix F—Exemplars

I know there will be many organizations seeking your financial support in the 1976 elections. My experience with the U. S. Senate has impressed me with this body's importance as a source of responsibility and continuity in our government. Senators serve six years, and one-third of the Senate is elected every two years. The people we elect in 1976 will be in office until 1982—in office during years of crises and great challenges to our democracy.

There are now 38 Republicans in the Senate—with the contest in New Hampshire still pending. (Incidentally, Louis Wyman, the Republican who was certified as the winner of that very close New Hampshire race, has not yet been seated formally. If a special election in New Hampshire is required to settle that contest once and for all, the National Republican Senatorial Committee will need funds immediately to assist Mr. Wyman's campaign for this seat.)

It is my sincere hope that you will generously support the Committee because it is imperative that the Committee receive funds now if it is to meet the commitments for radio, television and other campaign advertising necessary for Senate campaigns. With your help, we can elect more Republican Senators.

I have asked the Committee to separate answers to this letter from regular mail so that I may have a complete report of the response to this personal request.

It is my firm hope that 1976 will be a good year for you, for our country and for our future. Please believe me when I say that your decision to help this Committee elect Republican Senators will mean that 1976 will be

Appendix F—Exemplars

a year when we recommit our Nation to those principles and ideals we all hold dear.

Gratefully,

NELSON ROCKEFELLER
Vice President

A copy of our report is filed with the Federal Election Commission and is available for purchase from the Federal Election Commission, Washington, D.C. 20005.

Absolutely no taxpayers' funds have been used in the preparation or mailing of this correspondence.

36a

Office of the
DISTRICT ATTORNEY
KINGS COUNTRY

EUGENE GOLD
District Attorney

Municipal Building
Brooklyn, N. Y. 11201

PERSONAL—UNOFFICIAL

June 17, 1975

On May 12, 1975, four tickets amounting to \$51.00 were mailed to you for a baseball game scheduled between the New York Mets and the St. Louis Cardinals for Wednesday night, June 25, 1975.

You will recall that the Kings County Jewish War Veterans plan to play host to a group of disabled and hospitalized veterans at the Ball Park and your contribution would help to defray the expenses.

Perhaps there has been an oversight in mailing the check. Will you please be good enough to take care of this matter at this time.

Cordially yours,

EUGENE GOLD
Chairman

P.S. Please make check payable to Kings County Jewish War Veterans. It's tax deductible—of course.

P.P.S. If your check has already been mailed please disregard this letter.

No. 75-1032

Supreme Court, U. S.

FILED

APR 21 1976

MICHAEL J. BROWN, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

GERARD P. TROTTA, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1032

GERARD P. TROTTA, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B, pp. 12a-21a) is reported at 525 F. 2d 1096. The opinion of the district court (Pet. App. A, pp. 1a-11a) is reported at 396 F. Supp. 755.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1975. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on December 22, 1975 (Pet. App. C, pp. 22a-23a). The petition for a writ of certiorari was filed on January 21, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an indictment charging petitioner with unlawfully affecting interstate commerce by knowingly and willfully demanding and obtaining money from an engineering firm for the benefit of a Republican committee, with the firm's consent to the payment having been induced by petitioner under color of official right, charges a violation of the Hobbs Act, 18 U.S.C. 1951.

2. Whether, if the indictment charges a violation of the Hobbs Act, the application of that Act to petitioner under the circumstances of this case violates due process.

STATUTE INVOLVED

The Hobbs Act, 18 U.S.C. 1951, is set forth at Pet. App. D, pp. 24a-25a.

STATEMENT

On October 31, 1974, a grand jury impanelled in the Eastern District of New York returned a second superseding indictment (Pet. App. E, pp. 26a-29a) charging petitioner with two counts of extortion under the Hobbs Act, 18 U.S.C. 1951. The indictment alleged that petitioner, while Commissioner of Public Works of the Town of Oyster Bay, Long Island, unlawfully affected interstate commerce by "knowingly and willfully" demanding and inducing payments of \$2,000 (count 1) and \$1,000 (count 2) in political contributions to the local Republican Committee from the engineering firm of William F. Cosulich Associates ("Cosulich"). The indictment further alleged that the consent of Cosulich to these payments was induced by petitioner "under color of official right." These charges were prefaced by allegations that, during the relevant periods, Cosulich provided engineering services to municipal corporations including Oyster Bay, and that petitioner, as Commissioner of Public Works, was authorized to retain

engineering firms for town projects and to monitor their performance. The indictment also alleged that Cosulich reasonably understood that petitioner "had * * * the power to take action which could adversely affect [Cosulich] in obtaining and performing contracts with the Town of Oyster Bay * * *."

Petitioner moved in the district court to dismiss the indictment on the ground that it failed to allege with sufficient specificity all of the facts necessary for a conviction under the Act. The district court granted the motion (Pet. App. A, p. 11a). It held that the indictment failed to charge "the key essential element [of extortion] — actions or words by the alleged extortioner which induce a reasonable compulsion in the victim to submit to the extortioner's demand" (Pet. App. A, p. 8a). The district court reasoned that an indictment charging extortion "under color of official right" must also allege a specific "corrupt use" of office by the public official (Pet. App. A, pp. 9a, 11a), because "[t]he words 'wrongful use of' in the statutory definition, §1951(b)(2), must be read in conjunction with 'under color of official right' * * *" (Pet. App. A, p. 10a).

On the government's appeal, the court of appeals reversed and remanded the case for trial (Pet. App. B, p. 21a). The court noted that the indictment charged petitioner in the terms used by the statute, and was otherwise specific as to the time, place and amounts of the payments (Pet. App. B, pp. 17a-18a). The court held that the indictment charged an offense under the Hobbs Act because (Pet. App. B, p. 18a)

the phrase "under color of official right" as used in §1951 has an historically recognized and accepted meaning which, taken together with the rest of the indictment, makes it clear that [petitioner] is charged with using the power of his office over Town engineering contracts to induce payments of money from Cosulich which [petitioner] had no right to receive. [Footnote omitted.]

The court of appeals rejected the contention that an indictment under the Hobbs Act must allege a specifically identifiable misuse of office. The court noted that the use of the public office to procure payments of money not owed to the public official "is, in itself, the misuse of the office; and * * * it does not matter whether [petitioner] 'induced payments to perform his duties or not to perform his duties' " (Pet. App. B, p. 21a, quoting from *United States v. Braasch*, 505 F.2d 139, 151 (C.A. 7), certiorari denied, 421 U.S. 910).

ARGUMENT

1. This petition challenges the court of appeals' reversal of the district court's pre-trial dismissal of the indictment. That reversal puts petitioner in the same position as if the district court had ruled against him in the first instance; such a ruling would not have been subject to interlocutory appeal. See *Cobbledick v. United States*, 309 U.S. 323. Similarly, review now by this Court of the court of appeals' decision here would be premature. At trial petitioner may be acquitted, in which case his claim will be moot. If, on the other hand, petitioner is convicted and the conviction is affirmed, he will then be able to present all his contentions to this Court by way of a petition for certiorari seeking review of the final judgment.

2. In any event, the court of appeals properly rejected petitioner's contentions.

a. Petitioner contends (Pet. 5-6) that an indictment under the Hobbs Act for extortion under color of official right must allege a specifically identifiable misuse of office. Petitioner is contending in essence that the indictment must allege a specific actual or a promised exercise (or forbearance from the exercise) of official power as the inducement for the relinquishment of property. This

contention is incorrect; although the inducement constituting extortion under color of official right may include a *quid pro quo* arrangement, such an arrangement "is not an essential element of the crime" (Pet. App. B, p. 21a).

The Hobbs Act defines extortion, in relevant part, as "the obtaining of property from another, with his consent, induced * * * under color of official right." 18 U.S.C. 1951(b)(2).¹ Under this definition, it is enough that the public office held by the one who demands payment "provides the coercive impetus which generates the payment." *United States v. Staszczuk*, 502 F.2d 875, 883 (C.A. 7) (concurring opinion of Judge Campbell), reversed in part on other grounds (*en banc*), 517 F.2d 53 (C.A. 7); see *United States v. Hathaway*, C.A. 1, No. 75-1352, decided March 24, 1976; *United States v. Kuta*, 518 F.2d 947 (C.A. 7), certiorari denied December 8, 1975 (No. 75-307); *United States v. Price*, 507 F.2d 1349 (C.A. 4). The pressure exerted by a public official's demand for payment "under color of official right" is itself the "misuse of office" prohibited by the Hobbs Act.²

¹This is the definition of extortion as it was known at common law (see *United States v. Kenny*, 462 F. 2d 1205, 1229 (C.A. 3), certiorari denied, 409 U.S. 914), where "a public official who under color of office obtained the property of another not due either to the office or the official was guilty of extortion." *United States v. Nardello*, 393 U.S. 286, 289. Petitioner asserts (Pet. 5), without discussion or analysis, that the decision below conflicts with *United States v. Sutter*, 160 F. 2d 754 (C.A. 7). However, *Sutter* involved the construction of a different statute, 18 U.S.C. 872.

²As Mr. Justice Clark stated in *United States v. Braasch*, *supra*, 505 F.2d at 151:

It matters not whether the public official induces payments to perform his duties or not to perform his duties, or even, as here, to perform or not to perform acts unrelated to his

In the instant case, the indictment charges that petitioner knowingly and willfully used his official power over the town's engineering contracts to induce from Cosulich payments of money to which petitioner was not entitled. These allegations are sufficient to state an offense under the Hobbs Act.³ As the court of appeals concluded (Pet. App. B, p. 21a):

[T]he pressure exerted by [petitioner] by means of the power of his public office to induce the payment of the money is, in itself, the misuse of the office; and, as stated in *Braasch, supra* [505 F.2d at 151], it does not matter whether [petitioner] "induced payments to perform his duties or not to perform his duties." Nor does it matter that the payments may have been induced simply by assertion of power or pressure stemming from [petitioner's] position as a public official. *United States v. Price [supra]*. To repeat, it is the use of the power of the public office itself to procure the payments of money not owed to the public official or his office that constitutes the offense. This was adequately alleged; and we, therefore, hold that the indictment is sufficient on its face.

duties which can only be undertaken because of his official position. So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. §1951.

³As the court of appeals noted (Pet. App. B, p. 15a, n. 2), "[t]hat the direct benefit of the money paid went to the Republican Committee rather than to [petitioner] does not lessen [petitioner's] culpability under the statute." See *United States v. Green*, 350 U.S. 415, 420.

b. Petitioner also contends (Pet. 6-9) that the Hobbs Act should not be applied to demands for political contributions since the fund-raiser is pursuing a "socially legitimate end" (Pet. 7). In support of this contention, petitioner cites *United States v. Enmons*, 410 U.S. 396, in which the Court held that the use of violence or force by union workers to obtain higher wages was covered by the Hobbs Act only if the workers had no lawful claim to the property. But *Enmons* does not help petitioner.⁴ There, the Court rejected, in the context of labor relations, the argument that the Act "reaches the [wrongful] use of violence to achieve legitimate union objectives * * *," since "[i]n that type of case, * * * the workers [are demanding] the wages to which they are entitled in compensation for their services" (410 U.S. at 400).⁵ Here, in contrast, the very essence of the charge is that petitioner under color of official right is demanding property to which he has no lawful claim. Fund raising for one's political party is a legitimate activity, but under the Hobbs Act the demanding of such contributions under color of official right is a "wrongful" taking of * * * property" (*ibid.*).

⁴*Enmons* considered a indictment charging the type of extortion defined in the Hobbs Act as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear * * *." The Court read the word "wrongful" in that definition to limit coverage of the Act to use of force, violence, or fear for the "wrongful" taking of property. Here the indictment charges "induce[ment] * * * under color of official right," a definition of extortion in the Hobbs Act in which the word "wrongful" does not appear. Contrary to the district court in the instant case (Pet. App. A, p. 10a), the structure of the statute's definition of extortion precludes reading "wrongful" in conjunction with "under color of official right." See Pet. App. B, pp. 17a-18a, n. 5.

⁵In reaching this conclusion, the Court relied on specific legislative history dealing with labor union activities. 410 U.S. at 401-408.

Thus, contrary to petitioner's position (Pet. 6, 8), the Hobbs Act does not threaten public officials engaged in legitimate political fund raising. Inherent in the phrase "under color of official right" is the requirement that the public official be shown to have acted with specific intent.⁶ The indictment at issue here specifically alleges the requisite *scienter*; it charges petitioner with "knowingly and willfully" obtaining money from Cosulich "under color of official right." Petitioner (and any other person similarly indicted) could therefore be convicted under the Hobbs Act only if the trier of fact finds that he acted with this guilty state of mind.

3. Petitioner also contends (Pet. 7-9) that the application of the Hobbs Act in this case is unconstitutional, principally because petitioner was not given fair warning that his conduct was prohibited. This contention is based in part on his erroneous characterization of the government's position as to what is prohibited and what state of mind the government must show in order to convict. Moreover, this argument is premature, since we do not yet know what the evidence will show as to petitioner's acts and state of mind or how the jury will be instructed. A challenge to the constitutionality of a statute as applied to specific conduct cannot, in short, feasibly be determined in advance of trial, particularly when, as here, the indictment charges the offense in the language of the statute.

⁶As the district court pointed out (Pet. App. A, p. 10a), at common law the "terms 'under color of office' and 'under color of official right' are technical expressions implying bad faith, corruption or breach of duty" (citing 3 Wharton, *Criminal Law* §1394 (Anderson ed. 1957); R. Perkins, *Criminal Law* 371 (2d ed. 1969)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court, U. S.

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—against—

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ON PETITION FOR A WRIT OF CERTIORARI TO
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THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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April 27, 1976

IN THE
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OCTOBER TERM, 1975

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—against—

UNITED STATES OF AMERICA.

PETITIONER'S REPLY BRIEF

Statement

This brief is submitted in reply to the "Brief for the United States in Opposition" served upon Petitioner on or about April 23, 1976.

ARGUMENT

1. **Response to the Government's argument that review now by this court is procedurally premature (P. 4 of Brief).**

This contention must be rejected for two reasons:

(1) It is a denial of due process to subject an individual to the stigma, expense, and anxiety of a criminal trial based upon an infirm indictment. (See *Klopper v.*

North Carolina, 386 U.S. 212, 221-222 (1967) where the Court indicated that a defendant awaiting trial on bond is exposed to public scorn, deprivation of employment, and chilled in the exercise of his right to speak or associate and participate in unpopular political causes, and *United States v. Enmons*, 410 U.S. 396 (1973) where this Court affirmed a lower court's dismissal of an indictment pre-trial). Petitioner will be irreparably damaged if he is forced to go to trial, is convicted, and his conviction is affirmed, before this Court ultimately decides that the indictment and theory of the prosecution are totally defective.

(2) The Court of Appeals decision below, which reversed the trial court's dismissal of the indictment, established the law of the case and set forth the elements that are necessary for a jury to bring in a conviction. If the Court of Appeals directive stands, all that is necessary for conviction is for the jury to find:

- (a) That petitioner was a public employee;
- (b) That he had certain statutory power which *could* be used to affect Cosulich's business with the Town;
- (c) That Cosulich knew of petitioner's statutory power; and
- (d) That Petitioner successfully approached Cosulich for contributions to a political party.

Under the Court of Appeals directive, the government need not prove, the court need not charge, and the jury need not find, that petitioner imparted or exploited a reasonable belief that he had effective influence over the award of contracts. The "corrupt use" of the office has been totally eliminated. Petitioner stands in no worse position than any other public employee who seeks funds for any socially legitimate end (whether it be the Boy

Scouts, a local charity, higher wages, or political contributions), from one over whom he holds any degree of power, no matter how equivocal, no matter how slight.

None of the important decisions of recent years involving the application of the Hobbs Act to public employees is supportive of the government's view. In each of the cases, the essential connection between (1) power, and (2) payment, was (3) *the specific identifiable misuse of office*. It is the absence of the latter element which is the critical infirmity in the accusation against this petitioner. (For a survey of Hobbs Act cases, see 396 F. Supp., p. 757, reproduced at p. 4a of the Petition).

Beyond petitioner's own stake in this case, the Court of Appeals decision not only has a "chilling effect" on local political fund-raising efforts (a problem which was recently considered in *Buckley v. Valeo*, — U.S. —, 96 S. Ct. 612, [1976]), but heralds a new judicially created social revolution. Is Nelson Rockefeller an extortionist when the Vice President solicits on behalf of his own Party? Is the local district attorney an extortionist when he solicits (from lawyers dealing with his office) on behalf of his favorite charity? The government's position is *yes*.

2. (a) **Answering the Government's argument that that an indictment under the Hobbs Act for extortion under color of official right need not allege "a specifically identifiable misuse of the office" (P. 4 of Brief).**

The within indictment does not contain an allegation that petitioner "used or abused his official position in seeking or obtaining the political contributions" and the government maintains that it need not contain such an allegation nor is such proof required at trial for a con-

viction. The government has thus created a species of strict criminal liability; wrongdoing need not be proved. The government's position is that the *mere request* for funds addressed to one whom the public employee *might* potentially affect, is extortion under the Hobbs Act. The viciousness of this position is that the government is empowered thereby to bring prosecutions which are *ex post facto*. *Bowie v. City of Columbia*, 378 U.S. 347, 352 (1964).

2. (b) Answer to the Government's argument that its theory of the case "does not threaten public officials engaged in legitimate fund raising" (P. 7- of Brief).

The government argues that the within indictment alleges a culpable mental state of mind because it charges petitioner with "knowingly and wilfully" obtaining money from Cosulich under color of official right. The government has improperly equated the elements of "knowingly" and "wilfully" with that of "corrupt use of office". "Knowingly" and "wilfully" relate to the question of whether petitioner's acts were inadvertent or not, not whether petitioner acted with a corrupt heart and a guilty mind.

When Congressman Hobbs, the sponsor of the Act, was asked during Congressional debate on the bill, whether the word "wrongful" applied to the section of the Act in question, the Congressman answered emphatically, "Yes; *it qualifies the whole section*" (emphasis added; 91 *Cong. Rec.* 11908).

While the phrase "under color of official right" had an historically recognized and acceptable meaning at common law, the common law crime of extortion has no application to the case at bar. Common law extortion under

the color of official right involved the wrongful taking of a *fee* under color (appearance) of an official right to do so. The circuit courts (3rd Cir. in *United States v. Kenny*, 462 F.2d 1205 (1972); the 7th Cir. in *United States v. Staszczuk*, 502 F.2d 875; the 4th Cir. in *United States v. Price*, 507 F.2d 1349; the 1st Cir. in *United States v. Hathaway*, No. 75-1352, decided March 24th, 1976, and the 2nd Cir. in the case at bar), have distorted out of all recognition the common law crime of extortion, and have created a new species of criminality, never recognized at common law, never envisioned by the Congress, and never sanctioned by this Court.* As Justice Brandeis cautioned in his notable dissent in *Olmstead v. United States*, 277 U.S. 438 (1928):

"The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding".

* In *United States v. Green*, 350 U.S. 415 the Court was sufficiently concerned with whether the Hobbs Act envisioned a benefit to a third party, rather than directly to the extortioner, to grant review. But *Green* necessarily involved the "force, violence, of fear" aspect of the Hobbs Act—not the "under color of official right" aspect. Manifestly the decision could not have applied to the "color of official right" aspect since, at common law, extortion under the color of official right involved an unlawful *fee* under the pretense of office and by its very nature precluded payments to a third party who did not assume the color of the office. Thus *Green*, cited by the government (p. 6, n. 3), is not dispositive of the issue. However, the government's argument raises an additional important question warranting a grant of certiorari, to wit:

Will a third party payment sustain an extortion "under color of official right?"

That question was *not* decided in this Court's decision in *Green*.

3. Answering the Government's argument that the challenge to the constitutionality of the statute should not be determined in advance of trial (P. 8 of Brief).

Under the Court of Appeals decision the petitioner is convictable without the government having to prove any culpable act on the part of the defendant. Petitioner's demurrer is a concession that even though the facts in the indictment might be true, it does not allege a culpable act without which there cannot be a violation of the Hobbs Act.

It is alleged that petitioner solicited funds. Petitioner finds no need to dispute this. It is alleged that Cosulich made a contribution. Petitioner finds no need to dispute that. It is alleged that petitioner had a position of power. Petitioner finds no need to dispute that. It is alleged that a contribution by check was made payable to the political party of which petitioner was a member. Petitioner finds no need to dispute that. It is alleged that Cosulich believed that he could be affected by a misuse of power on the part of petitioner. Petitioner finds no need to dispute that.

It is *not* alleged that petitioner committed an act which would have given rise to a reasonable belief that his power was to be used to enforce a contribution. *This* is the allegation that petitioner wishes to dispute. As the circuit court's decision now stands, he will never get that opportunity and the only real triable issue in the case has been sedulously omitted from the indictment, thus making the trial a hollow formality.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this court should issue a writ of certiorari to review the decision below.

Respectfully submitted,

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